

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201527042**

Release Date: 7/2/2015

Index Number: 4942.03-02, 4942.03-05,
9100.00-00

Third Party Communication: None
Date of Communication: Not Applicable

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Refer Reply To:
CC:TEGE:EOEG
PLR-T-103421-15

Date:
March 26, 2015

Legend:

Taxpayer =
Trust =
State =
City =
Company A =
Company B =
Year 1 =
Year 2 =
Year 3 =
Year 5 =
Year 6 =
Year 7 =

Dear :

This is in response to the letter dated November 14, 2014, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file an election under § 53.4942(a)-3(c)(2)(iv) of the Foundation and Similar Excise Tax Regulations regarding the treatment of distributions.

Facts:

Taxpayer is a not-for-profit corporation recognized as an organization exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code and classified as a private non-operating foundation under § 509(a). Taxpayer provides grants to community-focused organizations in State that are recognized as tax exempt under § 501(c)(3) and classified as public charities under § 509(a), or that are governmental units. Taxpayer requires that

the organizations' proposed projects correspond with its mission to strengthen rural State communities, especially those in the local City area. Taxpayer receives annual grants from Trust, which represents all or substantially all of the grant receipts each year.

During Year 6, Taxpayer switched its audit and tax preparation firm from Company A to Company B to handle the information reporting for taxes that year. Company A had also provided tax preparation services for Trust. Before beginning its work for Year 6, Company B reviewed previously filed Forms 990-PF. They discovered that each of the returns filed for the previous five years contained a significant error in that Taxpayer failed to make an election under § 53.4942(a)-3(c)(2)(iv) of the regulations. This error was not evident on the return, since the preparer omitted any entry on Part XIII's line 7, and instead completed Part XIII line 4 where it attributed current year qualifying distributions out of corpus while stating on line Part XIII line 5 that Taxpayer would use excess distributions carryovers to satisfy its current year distributable amount.

Taxpayer was notified in July of Year 7 by Company B of their conclusion that the previous filed returns were incorrect. Taxpayer immediately consulted with tax counsel who confirmed that there were various preparation errors. Under the guidance of Company A, all of the previous five year returns were timely filed, but did not elect to treat any portion of the available excess qualifying distributions of the preceding five years as a current distribution out of corpus under the election in satisfaction of the redistribution obligation under § 4943(g)(3). Company A instead prepared the Year 1 through Year 5 information returns accompanied by an unsigned election under § 53.4942(a)-3(d)(2) of the regulations, purporting to designate each year's current qualifying distributions as being made entirely out of corpus. This resulted in an improper calculation of the excess distributions carryover each year.

Taxpayer relied on Company A to advise it on the proper completion of Part XIII of Form 990-PF. Company A omitted communicating to Taxpayer about the availability of, or requirement to use the election. There were some years where the qualifying distributions were less than 100% of the contributions received from private foundations in the immediately preceding year, but while Taxpayer was aware of the § 4942(g)(3) redistribution obligation for such dollars, it was not aware of the election or its application.

The information returns prepared by Company A reported excess qualifying distributions from the prior preceding five years and Taxpayer met the requirement to make the election. Taxpayer asserts that none of the excess qualifying distributions were used for any other purpose and there was no intention to use them for any other purpose.

Taxpayer has submitted sworn affidavits from its officer who served as the Director of Finance/Treasurer, its attorney, and a tax partner from Company B. The affidavit from director declares that Company A had been providing Taxpayer with an independent audit of the financial statements and preparing the Form 990-PF annual information returns and Form 990-T returns. Company A had the same partner from its firm work with Taxpayer on these forms and he signed as paid preparer. However, according to the director's affidavit, in Year 1, Company A began to have a principal of the firm described as having extensive private foundation experience work with Taxpayer. The director attests that they relied on her to improve the Audit Committee's understanding of the more technical areas of the Form 990-PF, and in particular, Parts X-XIII. In Year 1 and subsequent years' Forms 990-PF prepared by Company A's principal, she altered the reporting methodology employed

by the previous preparer and no longer placed the amount of § 4942(g)(3) distribution obligations on Part XIII's line 7, but reflected the attribution of the current year qualifying distributions to corpus on that Part's line 4c and stated the same in a statement of election.

The director also affirms that the Audit Committee noted in its September Year 2 review meeting of the Year 1 Form 990-PF that it addressed with the principal preparer the excess distribution carryover specified on the return being much higher than calculated in previous years. The principal's response was that the prior year's tax return had excess distributions so there was no requirement to make any distributions in Year 1. At the August Year 3 Audit Committee meeting, the principal addressed the Part XII, Year 2 Form 990-PF and stated that Taxpayer did not have a § 4942(g)(3) redistribution shortfall. The director attests that the principal preparer never informed her or the Committee of the specific legal procedural requirements by which Taxpayer would need to access prior years' distributions carryovers. She also attests that Taxpayer was not apprised of the election and that it relied on the principal, as its preparer, and her firm, to satisfy all procedural requirements. The failure to elect to treat any portion of the available excess qualifying distributions of the preceding years as a current distribution out of corpus wasn't the intention of Taxpayer and was done without their knowledge or understanding.

The affidavit from the tax partner at Company B stated that a review of the Year 5 Form 990-PF uncovered an inaccurate excess distribution carryover to Year 6. A further review of the previously filed Year 1 through Year 5 Form 990-PFs uncovered that the forms did not properly reflect the contributions from other private foundations being redistributed in a timely manner. Moreover, the review determined that none of the forms properly showed that Taxpayer met the § 4942(g)(3) redistribution requirement. The preparer of those returns failed to use the appropriate Part XIII lines and utilize the proper elections. Specifically, the Company B tax partner opined that the returns did not include the necessary election to apply prior year excess distributions to the redistribution requirement under § 4942(g)(3) on line 7 of Part XIII which consequently led to the excess distributions from Year 5 being significantly overstated.

Taxpayer's attorney avowed in her affidavit that prior to being engaged by Taxpayer in July Year 7, neither she nor her firm provided preparation services, or any review of the Forms 990-PF. The attorney provided a legal opinion to the Audit Committee that the previously filed Forms 990-PF for Year 1 through Year 5 signed by the principal from Company A were deficient in multiple places. Some of the deficiencies noted were that the Part XIII Line 4c "declaration of election" statement attached to the filings lacked any execution line for signing and also did not include a signature by the foundation manager and there was no basis provided by which Taxpayer's intent to meet a § 4942(g)(3) redistribution obligation related to its primary source of revenues, grants from Trust, was evidenced since the preparer left Line 7 of Part XIII blank. Upon analysis of the previously filed return, the attorney established a base year for which the prior five years excess carryover distribution could be reasonably relied upon and also proposed amendments to Part XIII for each of those year's returns. She recommended employing a consistent methodology to apply the qualifying distributions to ensure that no redistribution shortfall will exist and to maximize each year's use of prior year's excess distribution carryovers.

Taxpayer states that had it known of the statutory and regulatory overlay of requirements reported upon the Form 990-PF's Part XIII, Line 7, it would have signified its use of corpus to satisfy § 4942(g)(3) with respect to contributions received from private non-operating

foundations. Taxpayer states that it acted reasonably and in good faith at all times, and reasonably relied on a qualified tax professional to prepare its federal tax returns. The failure to make the election was due to the preparer's errors and the overall failure of the preparer to properly account for, and properly utilize available procedural mechanisms to utilize excess distribution carryovers.

Rulings Requested:

1) Taxpayer requests an extension of time be granted under § 301.9100-3 to file the election under § 53.4942(a)-3(c)(2)(iv) concerning the treatment of distributions for the tax years Year 1 through Year 5. Taxpayer further requests that such election may now replace the unsigned elections filed with such returns which purported to access the election.

Law:

Section 170(b)(1)(F)(ii) provides, in part, that contributions by an individual to a private foundation that makes qualifying distributions that are treated as distributions out of corpus in an amount equal to 100 percent of the contribution within three months and 15 days of the end of the private foundation's taxable year, are deductible at 50 percent of the taxpayer's contribution base for the taxable year.

Section 4942(a) provides for the imposition on the undistributed income of a private foundation for any taxable year, which has not been distributed before the first day of the second (or any succeeding) taxable year following such taxable year (if such first day falls within the taxable period), a tax equal to 30 percent of the amount of such income remaining undistributed at the beginning of such second (or succeeding) taxable year.

Section 4942(d) defines a private foundation's "distributable amount" for any taxable year as an amount equal to (1) the sum of the minimum investment return plus the amounts described in subsection (f)(2)(C), reduced by (2) the sum of the taxes imposed on such private foundation for the taxable year under subtitle A and § 4940.

Section 4942(h) provides rules as to the treatment of "qualifying distributions" made during a taxable year. Generally, qualifying distributions for a taxable year are treated as made (A) first out of the undistributed income of the immediately preceding taxable year (if the private foundation was subject to tax imposed by this section for the preceding year) to the extent thereof, (B) second out of undistributed income for the taxable year to the extent thereof, and (C) then out of corpus.

Section 53.4942(a)-3(c)(2)(iv) provides that a donee organization may elect to treat as a current distribution out of corpus any amount distributed in a prior taxable year which was treated as a distribution out of corpus under paragraph (d)(1)(iii) of this section provided that (a) such amount has not been availed of for any other purpose, such as a carryover under paragraph (e) of this section or a redistribution under this paragraph for a prior year, (b) such corpus distribution occurred within the preceding 5 years, and (c) such amount is not later availed of for any other purpose. Such election must be made by attaching a statement to the return the foundation is required to file under § 6033 with respect to the taxable year for which such election is to apply. Such statement must contain a declaration by an appropriate foundation manager (within the meaning of § 4946(b)(1) that the foundation is making an election under this paragraph and it must specify that the distribution was treated under paragraph (d)(1)(iii) of this section as a distribution out of corpus in a designated prior taxable year (or years). This election is permissible in order to

satisfy distribution requirements under § 170(b)(1)(F)(ii). Furthermore, for purposes of making the election, an extension of time for making the election may be available under the relief provisions found in § 301.9100-1.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make certain regulatory elections. Section 301.9100-1(b) defines a "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections may be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer:

- (i) Requests relief under this section before the failure to make the regulatory election is discovered by the Service;

- (ii) Failed to make the election because of intervening events beyond the taxpayer's control;

- (iii) Failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election;

- (iv) Reasonably relied on the written advice of the Service; or

- (v) Reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make the election.

Section 301.9100-3(b)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not:

- (i) Competent to render advice on the regulatory election; or

- (ii) Aware of all relevant facts.

Section 301.9100-3(b)(3)(ii) provides, in part, that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer was informed in all material respects of the required election and related tax consequences, but chose not to file the election.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are

prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made.

Section 301.9100-3(d)(2) provides, in part, that for relief to be granted, the Service may require the taxpayer to consent under § 6501(c)(4) to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made.

Section 301.9100-3(e)(2) & (3) specifies evidence which must be provided when a taxpayer requests relief under this section which includes (a) affidavit and declaration from taxpayer and (b) affidavits and declarations from other parties.

Section 301.9100-3(e)(4) further requires additional information to support request for relief under § 301.9100-3(a) which includes:

(i) The taxpayer must state whether the taxpayer's return(s) for the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made is being examined by a district director, or is being considered by an appeals office or a federal court. The taxpayer must notify the Service office considering the request for relief if the Service starts an examination of any such return while the taxpayer's request for relief is pending;

(ii) The taxpayer must state when the applicable return, form, or statement used to make the election was required to be filed and when it was actually filed;

(iii) The taxpayer must submit a copy of any documents that refer to the election;

(iv) When requested, the taxpayer must submit a copy of the taxpayer's return for any taxable year for which the taxpayer requests an extension of time to make the election and any return affected by the election; and

(v) When applicable, the taxpayer must submit a copy of the returns of other taxpayers affected by the election.

Analysis:

Taxpayer is an organization recognized as exempt under § 501(c)(3) and classified as a private foundation under § 509(a). As a private foundation Taxpayer is required to distribute all undistributed income by the close of the following tax year. See § 4942(a); see also § 4942(d) which defines "distributable amount."

Pursuant to § 53.4942(a)-3(c)(2)(iv), a private foundation may elect to treat as a current distribution out of corpus any amount distributed in a prior taxable year which was treated as a distribution out of corpus provided that such amount has not been availed of for any other purpose, such as a carryover under paragraph (e) of this section, or a redistribution under this paragraph for a prior year, and such corpus distribution occurred within the preceding five years, and such amount is not later availed for any other purpose. This election is allowed in order to satisfy distribution requirements under § 170(b)(1)(F)(ii). The election must be made by attaching a statement to the return the foundation is required to file under § 6033 with respect to the taxable year for which the election applies. The statement must contain a declaration by an appropriate foundation manager, within the meaning of § 4946(b)(1) that the foundation is making an election under this paragraph and it must specify that the distribution was treated under paragraph (d)(1)(iii) of this section as

a distribution out of corpus in a designated prior taxable year, or years.

Taxpayer did not properly make this election when it timely filed each of its Year 1 through Year 5 Form 990-PF information. However, Taxpayer asserts that it met the requirements in each of those years to make the election and that it acted reasonably and in good faith at all times because it relied on the experience of a qualified tax professional to properly prepare its returns. Taxpayer also avers that the tax professional neglected to advise it of the specific procedural legal requirements to access prior year's distribution carryovers and the availability of the election.

Under § 301.9100-3(a), when a taxpayer is required to make the election under § 53.4942(a)-3(c)(2)(iv) but omits to, a request for an extension of time for regulatory election(s) may be granted if the taxpayer provides evidence (including affidavits) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of the relief will not prejudice the interests of the Government. As further explained in § 301.9100-3(b)(1), a taxpayer will be deemed to have acted reasonably and in good faith if, among other things, the taxpayer requests relief under this section, before the failure to make the regulatory election is discovered by the Service, or if the taxpayer failed to make the election because of intervening events beyond their control, or failed to make the election because after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity of the election, or the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the taxpayer failed to make, or advise the taxpayer to make, the election.

Taxpayer provided documentation which included affidavits by one of its officers who also serves as a director, its attorney, and a tax partner from Company B to support the position that it acted reasonably and in good faith as required by § 301.9100-3(b)(1). Taxpayer reasonably relied on Company A and its preparer, who was also a principal of the firm, to properly advise it about the returns they prepared for Taxpayer and to explain the technical areas of the Form 990-PF such as Parts X-XIII. Taxpayer exercised reasonable diligence and held review meetings with the preparer to explain the excess distribution carryover. Taxpayer did not have any reason to believe that the preparer for Company A was not competent to render advice about required regulatory elections. In addition, the discovery of the failure to properly make the election on the Form 990-PF for Year 1 through Year 5 was by Company B rather than by the Internal Revenue Service.

In order to qualify for discretionary relief, a taxpayer must demonstrate that the interests of the Government will not be prejudiced by the granting of relief as required under § 301.9100-3(c)(1). The interest of the Government is prejudiced if granting such relief would result in a taxpayer having a lower tax liability than if the election had been timely made. Taxpayer represented and provided support to show that its request for relief for the late filing of an election under § 53.4942(a)-3(c)(2)(iv) to treat as current distribution out of corpus the amounts distributed in the prior taxable years, that are available as excess distributions carryovers held in corpus, does not result in it or its grantor(s) having lower tax liabilities than if they had timely properly filed such election. The affidavits and other evidence provided satisfy the requirements of § 301.9100-3(b)-(c) and the procedural requirements of § 301.9100-3(e). Therefore, to grant Taxpayer an extension of time to make the election will not prejudice the Government's interest in accordance to § 301.9100-3(c)(1)(i) .

Rulings:

Based on the facts and circumstances represented, we conclude that the requirements of § 301.9100-3 have been satisfied. As a result, Taxpayer is granted an extension of time to make an election under § 53.4942(a)-3(c)(2)(iv) in replacement of the unsigned elections filed with the Year 1 through Year 5 returns. The election shall be made by filing an amended Form 990-PF for these years and attaching a statement making the election to each amended return. Taxpayer shall have 60 days from the date of this letter ruling to file the amended returns. The amended returns and subsequent returns should reflect the revised carryover amounts.

In addition, a copy of this letter must be attached to the relevant returns. If Taxpayer files electronically it may satisfy this requirement by attaching a statement to the return that provides the date and control number of this letter ruling.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

Pursuant to the Power of Attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely,

Mary Jo Salins
Senior Tax Law Specialist
Exempt Organizations Branch 1
(Tax Exempt and Government Entities)